

**BEFORE THE DIRECTOR OF THE
DEPARTMENT OF PESTICIDE REGULATION
STATE OF CALIFORNIA**

In the Matter of the Decision of
the Agricultural Commissioner of
the County of Kern
(County File No. 014-ACP-KER-03/04)

Administrative Docket. No. 125

**Inland Crop Dusters, Inc.
5001 Stearman Avenue
Shafter, California 93263**

Appellant /

Procedural Background

Under Food and Agricultural Code (FAC) section 12999.5 and Title 3, California Code of Regulations (3 CCR), section 6130, county agricultural commissioners (CACs) may levy a civil penalty up to \$1,000 for certain violations of California's pesticide laws and regulations.

After giving notice of the proposed action and providing a hearing, the Kern CAC found that the appellant, Inland Crop Dusters, Inc. (Inland), committed one violation of the State's pesticide laws and regulations, pertaining to 3 CCR section 6614(b)(3). The commissioner imposed a penalty of \$1,000 for the violation.

Inland appealed from the commissioner's civil penalty decision to the Director of the Department of Pesticide Regulation. The Director has jurisdiction in the appeal under FAC section 12999.5.

Standard of Review

The Director decides matters of law using her independent judgment. Matters of law include the meaning and requirements of laws and regulations. For other matters, the Director decides the appeal on the record before the Hearing Officer. In reviewing the CAC's decision, the Director looks to see if there was substantial evidence, contradicted or uncontradicted, before the Hearing Officer to support the Hearing Officer's findings and the CAC's decision. The Director notes that witnesses sometimes present contradictory testimony and information; however, issues of witness credibility are the province of the Hearing Officer.

The substantial evidence test requires only enough relevant information and inferences from that information to support a conclusion, even though other conclusions might also have been reached. In making the substantial evidence determination, the Director draws all reasonable inferences from the information in the record to support the findings, and reviews the record in

the light most favorable to the CAC's decision. If the Director finds substantial evidence in the record to support the CAC's decision, the Director affirms the decision.

Factual Background

On September 11, 2003, Mr. Joel Yarborough, a Journeyman Pilot employed by Inland, made an aerial application of Danitol (Fenprothrin,) 41-A Drift Control and Odor Mask, to Ralph and Greg Palla's cotton sites numbered 29, 30, 35, 36, 37, 38 and 39. The aerial application employed the use of a helicopter. Meanwhile, Mr. German Robledo was driving to work in his convertible with the top down on the public road adjacent to the treated sites. Mr. Robledo alleged that he had been exposed to the pesticide being applied by Inland. When Mr. Robledo arrived at Golden Valley High School, he complained that he was experiencing nausea, eye irritation, and that he had a headache. Mr. Robledo washed his face and arms. Mr. Robledo vomited and continued to complain of the symptoms of nausea, eye irritation, and headache and was taken by school personnel to Mercy Southwest Urgent Care. Dr. Sohrabi treated Mr. Robledo for his nausea and red eyes, and gave him benadryl for his itching. Dr. Sohrabi released Mr. Robledo and recorded that Mr. Robledo's condition was caused by pesticide poisoning.

The County of Kern's Agricultural Department investigated the incident and issued Inland a notice of violation of 3 CCR section 6614(b)(3). The County classified the violation as serious as defined by 3 CCR section 6130 and imposed a corresponding fine of \$1,000. Inland appealed the violation and requested a hearing. After hearing the evidence presented, the Hearing Officer found that Inland violated 3 CCR section 6614(b)(3), that the violation was a serious violation because an actual health hazard resulted, and that the \$1,000 fine was justified because it was a repeat serious violation. Inland appealed the Hearing Officer's decision.

California Code of Regulations section 6614(b)(3)

3 CCR section 6614(b)(3) provides: "[n]otwithstanding that substantial drift will be prevented, no pesticide application shall be made or continued when: (3) [t]here is a reasonable possibility of contamination of nontarget public or private property, including the creation of a health hazard, preventing normal use of such property. In determining a health hazard, the amount and toxicity of the pesticide, the type and uses of the property and related factors shall be considered."

When levying fines, the CAC must follow the fine guidelines in 3 CCR section 6130. Under section 6130, a minor violation is one that did not create an actual health or environmental effect or did not pose a reasonable possibility of creating a health or environmental effect, and the fine range is \$50 to \$150 per violation. A moderate violation is a repeat of a minor violation or one that posed a reasonable possibility of creating a health or environmental effect, and the fine range is \$151 to \$400 per violation. A serious violation is a repeat of a moderate violation or one that created an actual health or environmental hazard, or violations that are repeat moderate violations, and the fine range is \$401 to \$1,000 per

Appellant's Allegations

The Appellant contends that the Hearing Officer improperly based his decision that Inland caused Mr. Robledo a health hazard because no traces of Danitol was found on Mr. Robledo's dashboard or hat, and that only .09 ppm of Danitol was found on the convertible's windshield. The Appellant contends that the County investigation did not give the specific location of the vehicle in relation to the helicopter at the time of the alleged incident. The Appellant also contends that neither his pilot nor his ground spotter observed Mr. Robledo's convertible or Mr. Robledo vomiting alongside the road. Finally, the Appellant contends that no blood work or other medical tests were performed to accurately ascertain Mr. Robledo's medical condition, and that the doctor made his diagnosis solely on Mr. Robledo's allegations of his symptoms.

The Hearing Officer's Decision

The Hearing Officer made nine findings of fact upon which he based his conclusion that there was enough evidence in the record to establish that Inland continued to make its application when there was a reasonable possibility of contamination of nontarget public or private property, including the creation of a health hazard.

There is evidence in the record that shows the miticide Danitol is a restricted use pesticide with the signal word "Warning." There is also evidence in the record that the Danitol label states: "Hazards to Humans and Domestic Animals: . . . May be fatal if swallowed. Causes substantial but temporary eye injury. Cause skin irritation. Harmful if inhaled. 'First Aid'— If in eyes: Hold eye open and rinse slowly and gently with water for 15-20 minutes. . . . If on skin or clothing: Take off contaminated clothing. Rinse skin immediately with plenty of water for 15-20 minutes. Call a poison control center or doctor for treatment advice. If inhaled: Move the person to fresh air. . . ." There is evidence in the record that Drift Retardant 41-A, with the signal word, "Caution," states on the label, "Do not get in eyes or on skin. Harmful if swallowed." Both of these products were in the tank mix applied by Inland.

The County introduced evidence that Mr. Robledo's vehicle tested positive for the active ingredient in Danitol, albeit .09 ppm. The baseball cap and the dashboard of Mr. Robledo's vehicle had no traces of the active ingredient in Danitol.

The County put up on an overhead map of the treatment area and the County's witness, Ms. Marilou Lagasca, Agricultural Biologist/Weights and Measures Inspector III, testified that the application took place on both sides of Hosking Road and the west side of South H Street. Ms. Lagasca also testified and indicated on the overhead map the spot where Mr. Robledo alleged that he saw a helicopter about 15 to 20 feet away from him as he was traveling eastbound and he felt pesticides land on him. Ms. Lagasca testified that Mr. Robledo told her that he immediately started gagging, felt an irritation on his face and was overwhelmed with the odor. According to the record, Mr. Robledo vomited when he got to the school, not along the road at the application site.

There is evidence in the record that the attending physician signed a medical document that stated that Mr. Robledo had nausea and red eyes. The diagnosis made by the attending physician was pesticide poisoning.

There is evidence in the record that the symptoms exhibited by Mr. Robledo was the same as indicated on the label of Danitol; i.e., temporary eye injury and skin irritation.

Finally, there is evidence in the record of a previous drift incident on March 31, 2003, and that Inland was fined \$600 for a serious violation. The fine levied by the Hearing Officer for this September 11, 2003, incident was \$1,000, based upon that fact that it was a repeat violation in the serious category within a two year period.

Analysis and Conclusion

There is substantial evidence in the record to support the Hearing Officer's finding that Inland took precautions to prevent substantial drift, i.e., the use of a spotter and traffic control. However, the Hearing Officer found that the application resulted in contamination of private nontarget property and caused a health hazard.

In its March 16, 2005, letter to the Department seeking an appeal of the County's decision, the Appellant states that there is no substantial drift and thus no health hazard. Witness testimony demonstrated that Inland practiced good standards of care during its application to the Palla's cotton fields. The record shows that Mr. Robledo drove past the application site, smelled and felt the pesticide contact him, gagged, felt an irritation on his face, later vomited, sought medical attention and was diagnosed by a medical doctor to have suffered from pesticide poisoning. These facts demonstrate that there was sufficient evidence to find that Inland continued with the application when there was a reasonable possibility of contamination of nontarget private property; i.e., Mr. Robledo and his vehicle.

There is sufficient evidence in the record to rebut the Appellant's contention that the County investigation did not give specific locations of the vehicle in relation to the helicopter at the time of the incident. An overhead map was displayed and Ms. Lagasca testified to the location of Mr. Robledo's vehicle at the time he alleged that he smelled and felt the pesticide.

The Appellant's contention that they did not see Mr. Robledo's vehicle pull over nor see Mr. Robledo vomit at the side of the road is immaterial. There is evidence in the record that Mr. Robledo did not pull over at the application site, but rather he vomited after he arrived at the high school.

The Appellant contends that no pesticide was found on Mr. Robledo's person; i.e., Mr. Robledo's baseball cap. The Appellant states that the attending physician did not order a blood test to absolutely establish pesticide exposure. The Appellant speculates that Mr. Robledo's condition was from another problem with symptoms similar to exposure to the miticide Danitol. However, there is evidence in the record that shows that Mr. Robledo's windshield tested positive for Danitol and that Mr. Robledo's

symptoms were consistent with those listed on the Danitol label. The Hearing Officer concluded that the evidence established that despite preventing substantial drift, Inland applied a pesticide when there was a reasonable possibility of causing contamination to Mr. Robledo and his vehicle, including a creation of a health hazard.

The County presented evidence of a previous serious violation involving pesticide drift that occurred on March 31, 2003, for which the Respondent was fined \$600. The September 11, 2003, incident caused a health hazard to Mr. Robledo. Therefore, the evidence supports a penalty in the "serious" range and the Hearing Officer legitimately exercised his discretion to fine Inland the maximum fine of \$1,000.

In conclusion, the Director finds that the evidence in the record is sufficient to support the Hearing Officer's decision.

Disposition

The commissioner's decision is affirmed. The commissioner shall notify the appellant how and when to pay the \$1,000 fine.

Judicial Review

Under FAC section 12999.5, the appellant may seek court review of the Director's decision within 30 days of the date of the decision. The appellant must file a petition for writ of mandate with the court and bring the action under Code of Civil Procedure section 1094.5.

STATE OF CALIFORNIA DEPARTMENT OF PESTICIDE REGULATION

By: MaryAnn Warmerdam
MaryAnn Warmerdam, Director

Dated: JAN 12 2006